Supreme Court, U.S.
FILED

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No. _____

In the
Supreme Court of the United States

CAROL Y. ROBINSON

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO
BLONDEAN Y. DAVIS
JOHN H. BRADLEY, JR.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

CAROL Y. ROBINSON
Pro se

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CHICAGO, IL 60637-1116
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21 pgs

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Carol Y. Robinson, an individual citizen of the United States, residing in the Northern District of Illinois. Petitioner has no corporate affiliations. Carol Y. Robinson was the Plaintiff in the District Court, and the Appellant in the Seventh Circuit Court of Appeals.

Respondents

The Board of Education of the City of Chicago - Pursuant to amendments to the Illinois School Code, the Illinois Legislature established the Chicago School Reform Board of Trustees, in an amendatory act which took effect in 1995, to take the place of the former Board of Education thereby turning over the control of the Chicago Public Schools to Mayor Richard M. Daley of Chicago. See, 105 ILCS 5/34-1, et seq. Each city having a population exceeding 500,000 shall constitute one school district which shall maintain a system of free schools under the charge of a board of education. The district shall be a body politic and corporate by the name of "Board of Education of the City of ....." and by that name may sue and be sued in all courts and places where judicial proceedings are had. 105 ILSC 5/34-2.

Blondean Y. Davis is an individual, formerly employed by the Board as Chief of Schools and Regions.

Davis resigned from the Board effective July 31, 2001. She is currently Superintendent of Matteson Elementary School District 162.

John H. Bradley, Jr. in an individual. Bradley is/was a principal at the Songhai Learning Center Petitioner is unaware of Bradley's current employment status with the Board.

Respondents Board, Davis, and Bradley were the Defendants in the District Court and the Appellees in the Seventh Circuit Court of Appeals.

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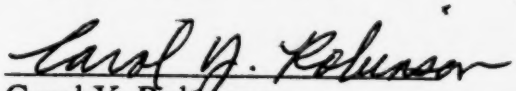
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STATEMENT OF COMPLIANCE

This supplemental appendix, consisting of the report and recommendation of the magistrate, United States District Court for the Northern District of Illinois, is hereby submitted in order to comply with the content requirements of Rule 14 as it pertains to petitioner's writ of certiorari.

The supplemental appendix complies in all respects with rule 33.1.

Respectfully submitted,



Carol Y. Robinson
Petitioner, Pro se
November 17, 2002

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CAROL Y. ROBINSON,	)	
	)	
Plaintiff,	)	Case No. 96 C 92
	)	
v.	)	Judge John A. Nordberg
	)	
BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,	)	Magistrate Judge Martin C. Ashman
	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

Pro se Plaintiff, Carol Robinson, sued Defendants, Chicago School Reform Board of Trustees (the "Board"), **[FN1]** Dr. Blondean Davis, and John H. Bradley, Jr. ("Bradley"), for employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and on various state-law grounds. **[FN2]** Defendants move for summary judgment as to all of Plaintiff's claims. For the reasons below, this Court recommends that Defendants' motion be granted in its entirety.

[FN1] "Board of Education of the City of Chicago" is not an entity that may be sued. The proper entity is the Chicago School Reform Board of Trustees. *See* 105 ILCS 5/34-1, et seq.

[FN2] Dr. Davis and Mr. Bradley have been dismissed from Plaintiff's Title VII claim. Defendants urge that Dr. Davis be dismissed from the state law claims because Plaintiff's Second Amended Complaint contains no allegations directed against Dr. Davis. Admittedly, Plaintiff does not identify precisely which state law claims are directed against which Defendants, but she does allege that Dr. Davis lied to the EEOC, falsified documents, and as a result, caused Plaintiff emotional distress. (Plaintiff's Second Amended Complaint, ¶ 42). Those allegations are sufficient to keep Dr. Davis from being dismissed, at least for now.

I. Background

The Board hired Plaintiff as a full-time substitute ("FTB") teacher and assigned her to the Park Manor School. Later, the Board transferred her to Scanlan School ("Scanlan"), where she also served as an FTB teacher until September 1, 1994. On that day, the Assistant Superintendent of Schools informed Plaintiff that she was being released as a FTB teacher, and tentatively reassigned her (subject to her acceptance) to a Substitute Cadre effective September 7, 1994. Plaintiff accepted the reassignment and served as a cadre substitute teacher until February 6, 1995, when whe became appointed full-time teacher at Parker Community Academy of the Chicago Public Schools. Three years later, she became tenured as an appointed full-time teacher, subject to removal only for cause. She has held that position ever since.

Plaintiff alleges in her Second Amended Complaint

that a pattern of alleged sexual harassment began in October of 1993, when Principal Bradley changed her room assignment. Between October of 1993 and June 25, 1994, several alleged acts of harassment occurred. However, for reasons explained below, those allegations are not considered because they are untimely. Thus, the first act of alleged harassment which this Court considers occurred on June 27, 1994, when Plaintiff requested from Bradley a performance rating. She alleges that after Bradley received her request, he told her, "You like making things hard don't you?," while looking in the direction of his crotch.

On or around that same time, Bradley allegedly told Plaintiff that she could have her performance rating improved if she were "cooperative" with him. Plaintiff asked Bradley what he meant, and he allegedly told her that she was a smart woman and that she knew what he meant. Sometime later, Bradley allegedly eyed Plaintiff from head to toe and stated, "I liked what I saw."

Plaintiff never complained nor raised any concerns to the Union delegate of Scanlan regarding her alledged treatment as a teacher. She never complained to any union delegate about her being displaced from Scanlan. She never formally filed a grievance against the Board through the Chicago Teachers' Union regarding her alleged treatment at Scanlan. However, on April 21, 1995, Plaintiff filed a charge of employment discrimination with the Equal Employment Opportunity Commission ("EEOC").

II Summary Judgment Standard

Summary judgment is proper only when "the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. Civ. P. 56 (c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In ascertaining whether summary judgment is appropriate, the Court must view the evidence, and draw all reasonalble inferences therefrom, in the light most favorable to the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992). If the non-movant bears the burdent of proof on an issue, however, he or she may not simply rest on the pleadings, but rather, must affirmatively set forth specific facts establishing the existence of a genuine issue of material fact. See *Celotex*, 477 U.S. at 322-26.

Summary judgment is appropriate where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burdent of proof at trial." *Id.* at 322. Consequently, motions for summary judgment myst be analyzed in light of both the applicable substantive law and the question of whether a reasonable jury could return a verdict in the non-movant's favor. See *Checkers, Simon & Rosner v. Lurie Corp.*, 864 F.2d 1338, 1334 (7th Cir. 1988). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-movant party, there is no genuine issue for trial," and summary judgment must be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. Analysis

Defendants argue that certain of Plaintiff's allegations of sexual harassment are untimely. In Illinois, and individual must file a complaint with the Equal Employment Opportunity Commission ("EEOC") within 300 days of the onset of the alleged discriminatory conduct. See 42 U.S.C. § 2000e-5; *Koelsch v. Beltone Elecs. Corp.*, 46 F.3d 705, 707 (7th Cir. 1995). Failure to do so renders the complaint untimely. See *id.* The filing period is strictly applied. See *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984). Normally, then,

> the plaintiff cannot base her (in some cases his) suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations.

Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996).

Here, the allegations that occurred outside the statute of limitations are barred as untimely. Plaintifff alleges a pattern of sexual harassment that began in October 1993 and continued through August 1994. Because she filed her complaint with the EEOC on April 21, 1995, any acts that occurred prior to June 25, 1994 (300 days from April 21, 1995) cannot form the basis of her sexual harassment claim unless they are saved by the continuing-violation doctrine, see *Galloway*, supra.

While conceding as she must that not every alleged act occurred within the 300-day period, Plaintiff argues that at least two acts are closely related enough in time as to constitute a continuing violation. This argument succeeds only if it would have been unreasonalble to expect Plaintiff to sue before the statute ran.

Plaintiff admits in her complaint that she thought Bradley's behavior constituted actionalble harassment long before June 25, 1994, In paragraph 23 of her Second Amended Complaint, Plaintiff says that she informed Bradley on April 21, 1994 that she was going to report his "sexually harassing behaviors to the school's Local School Council." Also in paragraph 14, Plaintiff says that around February 22, 1994, she warned Bradley that "she was prepared to take legal action against him if he persisted in such behaviors." She also took "off a day or two to explore the legal ramifications of sexual harassment." So over a year before she filed charges with the EEOC, Plaintiff thought her sexual harassment claim to be sufficiently palpable as to threaten lawsuit. In light of these concessions, Plaintiff cannot now rely on the continuing-violation doctrine, and therefore, pursuant to *Galloway*, the sexual harassment claims based on acts that occurred before June 25, 1994 are dismissed.

Turning to the merits of Plaintiff's claim, it is unclear whether Plaintiff is relying on hostile-work-environment sexual harassment or economic quid-pro-quo sexual harassment or both as her theory for recovery. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986). Out of an abundance of caution, and in consideration of Plaintiff's pro se status, this Court will assess the merits of her harassment claim under both theories. In any event, neither is availing.

After eliminating from consideration all the acts that occurred prior to June 25, 1994, the following acts remain:

> (1) Bradley once told Plaintiff, "You like making things hard, don't you, " while looking in the direction of his crotch.
>
> (2) Bradley eyed Plaintiff from head to toe and said, "I liked what I saw."
>
> (3) Bradley suggested that Plaintiff could have her job rating restored if she was "cooperative" with him.
>
> After Plaintiff asked him what he meant by that, he stated that she was a smart womant and that she knew what he meant.

For Plaintiff to prevail, these three alleged acts must constitute either hostile-work harassment or quid pro quo harassment.

For hostile-work harassment to be actionable, it must be sufficiently severe or pervasive as to alter the conditions of the victim's employment and to create an abusive working environment. *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir.) (citing *Meritor*, 477 U.S. at 67). In analyzing a claim for hostile-work harassment, two questions must be answered. The first is whether the plaintiff was, because of her sex, subjected to such hostile, intimidating, or degrading behavior, verbal or nonverbal, as to adversely affect the conditions under which she worrked. *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1009 (7th Cir. 1994).

The second question is , if the Court finds a hostile environment in violation of Title VII, then was the defendant's response (or lack thereof) negligent. *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 535-36 (7th Cir. 1993).

The case of *Baskerville v. Culligan Int'l Co.* presents a significant hurdle to Plaintiff's claim here. There, the court, after analyzing nine separate incidents spread over seven months, concluded that they did not add up to sexual harassment. 50 F.3d 428, 431 (7th Cir. 1995). Most of those incidents, which will not be repeated here, see *id.* at 430, were tinged with more sexual innuendo than those of which Plaintiff presently complains. No reasonable trier of fact could find in Plaintiff's favor, and summary judgment should be granted in the Board's favor on the issue of sexual harassment based on a hostile-work environment.

> The EEOC has defined quid-pro-quo harassment as follows:
>
> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.

Id. (quoting 29 C.F.R. § 1604.11 (a)). The court in *Bryson v. Chicago State Univ.*, 96 F.3d 912, 915 (7th Cir. 1996), observed that a five-part test used by many Courts of

Appeals was a useful framework to determine whether a plaintiff has proved a claim of quid-pro-quo harassment. Under this test, a plaintiff must show (1) that she or he is a member of a protected group, (2) the sexual advances were unwelcome, (3) the harassment was sexually motivated, (4) the employee's reaction to the supervisor's advances affected a tangible aspect of her employment, and (5) respondeat superior has been established. See *id.* (interpreting the fourth factor broadly).

Once again, after eliminating the pre-June 25, 1994 allegations, the only allegation that is important here appears on paragraph 31 of Plaintiff's complaint:**[FN3]**

> On or around June 27, 1994, Bradley told Plaintiff that he was going to get rid of her, (remove her from her job) as soon as he could find a way to do so. He told her that it wasn't too late to save her job and get her former rating restored if she wanted to be "cooperative" with him. When Plaintiff asked what he meant he again told her that she was a smart woman and that she knew what he meant.

This allegation hardly satisfies even the most strained interpretation of the EEOC guideline, *supra*. There is nothing about a bare statement that one be "cooperative" that immediately suggests a sexual overture. Certainly body lalnguage, tone of voice, and so forth may transform an otherwise innocuous word or statement into sexual innuendo, but there is no evidence that Bradley did anything other thatn say that Plaintiff be "cooperative" with him. As such, no reasonable jury could find in Plaintiff's favor on any quid pro quo theory of harassment, and summary judgment should be granted in the Board's favor.

[FN3] If there are other allegations that support a quid-pro-quo quo claim, Plaintiff has not brought them to the Court's attention. This Court will not scour through the numerous exhibits and deposition transcripts filed by Plaintiff in search of evidence that may arguably support such a claim. See *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, (7th Cir. 1995).

Defendants also argue that any claim Plaintiff may have under Section 1983 is barred by the applicable two-year statute of limitations. When Plaintiff filed her original complaint, it was unclear to this Court whether Plaintiff was stating a civil rights claim under Section 1983. So in a March 27, 1998 order, Judge Nordberg informed Plaintiff that she may seek to amend her complaint to add such a claim. Plaintiff did amend her complaint, but did not add any civil rights claims. [FN4]. Accordingly, there are none to consider or discuss.

[FN4] Defendants, for completeness purposes, present argument as to the merits of any Section 1983 claims Plaintiff may be asserting. Plaintiff's complaint clearly makes no mention of Section 1983, and this Court understands from a statement in Plaintiff's brief that "she intends to file" a Section 1983 claim that Plaintiff is not now asserting any Section 1983 claims. Thus, this Court will eschew any unnecessary discussion of Defendants' arguments directed towards Plaintiff's nonexistent Section 1983 claims.

Next, Defendants contend that all of Plaintiff's state law claims are untimely, relying on the Illinois Govermental Tort Immunity Act, 745 ILCS 10/8-101

(1993), which bars civil actions commenced more than one year from the date the injury was received or the cause of action accrued. In Illinois, a cause of action does not accrue until the plaintiff knows, or reasonalbly should know, of his injury. *Hermitage Corp. v. Contractors Adjustment Co.*, 651 N.E. 2s 1132, 1134-36 (Ill. 1995); *Schweihs v. Burdick*, 96 F.3d 917m 920 (7th Cir. 1996). Plaintiff responds that a defense based on a statute of limitations is an affirmative defense which Defendants must raise in their answer. See FED. R. CIV. P. 8(c).

Under FED. R. CIV. P. 8(c), a defendant is required to set forth affirmative defenses, including the statute of limitations, in his initial pleading. A number of courts, however, have liberalized this pleading requirement by holding that, absent prejudice to the plaintiff, a defendant's failure to raise a statute of limitations defense in the initial pleading does not preclude him from later bringing a motion based on that defense. See *Devalk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326,334 (7th Cir. 1987) (techinical failure to plead affirmative defense is not fatal); *Lacy v. Ameritech Mobile Communications, Inc.*, 965 F. Supp. 1056, 1065 (N.D. Ill. 1997), *aff'd*, 142 F.3d 440 (7th Cir. 1998); *Stewart v. City of Chicago*, 1994 WL 46672, at *1 (N.D. Ill. Feb. 14, 1994); see generally 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1287, at 47-505 (1990). Thus, if the defendant asserts a limitations defense before trial, it is not waived.

Here, Defendants did not assert the statute of limitations as an affirmative defense in their Answer. They have, however, raised that defense in their motion for summary judgment. Plaintiff has not claimed that she was prejudiced by Defendants' failure to raise that defense

earlier. Indeed, any prejudice to Plaintiff would be very slight. Because all of Plaintiff's state law claims arises from her Title VII claim, no additonal discovery is needed. Furthermore, Defendants Davis and Bradley filed their Answers to Plaintiff's Second Amended Complaint on May 1, 1998. They filed their motion for summary judgment only a few months later, on July 31, 1998. Another type of prejudice Plaintiff would suffer (though she does not identify it) is a denial of a decision of her state-law claims on the merits. This is not the type of prejudice prohibiting an exception to the waiver rule. See *Lewis v. Hermann*, 775 F. Supp. 1137, 1143 (N.D. Ill. 1991); see also *Blatnicky v. Village of Shorewood*, 1996 WL 180070, at *5 (N.D. Ill. Apr. 15, 1996); *Czajkowski v. City of Chicago*, 1993 WL 350204, at *2 (N.D. Ill. Sept. 10, 1993). Accordingly, Plaintiff has not suffered any prejudice or unfair surprise as a result of Defendant's raising the limitation defense at this stage of the case.

Turning to the merits of the limitations defense, Plaintiff concedes that the statute of limitations applies by not presenting any argument that it does not. See , e.g. *United States v. Price*, 54 F.3d 342, 346 n.1 (7th Cir. 1995) (arguments not presented in briefs before magistrate are waived); *Citizens Ins. Co. of Am. v. Barton*, 39 F.3d 826, 828 (7th Cir. 1994) ("Arguments not raised in the district court are waived on appeal."). Therefore, all of her state law claims are barred by 745 ILCS 10/8-101.**[FN5]**

> **[FN5]** This Court is aware of the distinction between the onset of the alleged injury and the accrual of a cause of action. Clearly all of Plaintiff's alleged injuries occurred more than one year before she filed her complaint. While the date of the accrual of her state-law causes of

actions is not clear, Plaintiff has not presented any argument on the merits of Defendants' limitations defense, and has therefore waived her ability to raise them later. See *Price*, supra; see also *Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co.*, 840 F.2d 985, 991 (1st, Cir. 1988) ; *Divane v. Krull Elec. Co.*, 1997 WL 337447 (N.D. Ill. June 17, 1997).

Not only are those claims barred, they are also preempted by various Illinois statutes. Again, Plaintiff does not respond to the merits of Defendants' preemption argument, but instead contends that preemption is an affirmative defense under Rule 8(c), and therefore Defendants have waived that defense by not raising it in their Answer. This exact argument was rejected by Judge Kocoras in *Duncan v. Consolidated Freightways Corp. of Del.*, 1995 WL 530652, at *4-*5 (N.D. Ill. Sept. 7, 1995). This Court finds that Defendants have not waived the preemption defense for the reasons stated above in connection with the limitations defense and for the other persuasive reasons set forth in *Duncan*.

There is significant merit to Defendants' preemption argument. Defendants argue that because all of Plaintiff's tort claims are premised upon her Title VII claim, those claims are preempted by the Illinois Human Rights Act ("IHRA"), 775 ILCS 5/1-101 et seq.**[FN 6]**. Plaintiff makes no response and for that reason alone concedes this point.

[FN 6] Defendants also argue that the intentional infliction of emotional distress ("IIED") claim is preempted by the Illinois Workers' Compensation Act (IWCA"), 820 ILCS 305/1, et seq. There are

ways to avoid preemption under the IWCA, see *Hunt-Galloway v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 104 F. 3d 1004, 1016 (7th Cir. 1997), but Plaintiff has not made any argument in that regard. Therefore, the IIED claim is preempted by the IWCA. See *id.*

Common-law tort claims that depend on an allegation of sexual harassment may be brought only ounder the IHRA. See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 493 (7th Cir. 1997), aff'd in part, *Burlington v. Ellerth*, 118 S. Ct. 2257 (1998) (citing *Geise v. Phoenix Co. of Chicago, Inc.*, 639 N.E. 2d 1273, 1276-78 (Ill. 1994). Plaintiff alleges in her Second Amended Complaint, "Other complaints arising from the above stated action [i.e., her Title VII claim] include: Intentional Infliction of Emotional Distress; Gross Negligence; Willful and Wanton Misconduct; Retaliatory Discharge; and Conspiracy to Conceal Facts." (Plaintiff's Second Amended Complaint, ¶ 1.) Because these claims [FN7] are supported by the identical factual allegations of her Title VII calim, they are preempted by the IHRA.

[FN7] The claim of "Conspiracy to Conceal Facts" does not appear to be an actionable tort in Illinois. The Court is not familiar with that cause of action. Notably, Plaintiff concedes that "her complaint in regards to his claim may not be sufficiently clear and may very well be improper for the Plaintiff to pursue in conjunction with the 1983 claim she intends to file upon a motion to do so. Plaintiff cannot sufficiently argue this issue at this time." (Plaintiff's Memorandum in Support of Opposition to Defendant's Motion for Summary Judgment, at 8.) That concession bars her "Conspiracy to

Conceal Facts" claim, which should be dismissed.

Defendants also attack the merits of Plaintiff's IIED claim. This Court agrees that, even if such claim were not barred or waived, Plaintiff cannot establish a claim for IIED. Plaintiff mus show, *inter alia*, that Defendants' conduct was extreme and outrageous. See *Oates v. Discovery Zone*, 116 F.3d 1161, 1174 (7th Cir. 1997). It is clear from the evidence of record that there is no genuine issue of material fact that Defendants' conduct, although boorish, was not so extreme or outrageous as to be intolerable in a civilized community. Plaintiff must also show as part of her IIED claim that she suffered severe emotional distress. See *id*. Her complaints of feeling "anxious," "upset," and "fearful," (Plaintiff's 12(N) Statement, ¶ 36), hardly rise to the requisite level of severe distress. Therefore, Defendants motion for summary judgment should be granted on the merits as to Plaintiff's IIED claim for the independent reason that Plaintiff cannot prove all of the elements of that claim.**[FN8]**

> **[FN8]** Defendants also attack the merits of Plaintiff's retaliatory discharge claim. While the issue of whether she suffered an adverse employment action is not quite as clear-cut as Defendants maintain, that does not preclude a grant of summary judgment. The claim fails procedurally, see *supra*, so it is unnecessary to go into the substantive merits. Contrastingly, the IIED claim clearly has no merit and may be dismissed on both procedural and substantive grounds.

Plaintiff's case suffers from three major shortcomings: she has not brought forth sufficient

evidence to raise issues of material fact; she has sat too long on her procedural rights; and she has conceded many of Defendants' arguments by failing to respond meaningfully to them. **[FN9]**. These shortcomings, unfortunately, sound the death knell of this action.

> **[FN9]** There may be no meaningful responses available to her.

Plaintiff will no doubt be disappointed with this recommendation. However, in the end, this Court must restrict itself to the arguments presented and the evidence properly established in the record to determine the procedural rights of the parties and the substantive merits of the case, no matter how sympathetic a particular case may appear to be. Therefore, this Court recommends that Defendants' motion for summary judgment be granted.

s/_____

MARTIN C. ASHMAN
United States Magistrate Judge

Dated: February 3, 1999.